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No. 869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JULES S. BACHE TRUST FOR HAZEL B. BECKMAN u/d dated June 1, 1921, CLIFFORD W. MICHEL, C. FRANK REAVIS and WILLIAM B. FRANKE, Surviving and Successor Trustees,

JULES S. BACHE TRUST FOR KATHRYN B. MILLER, u/d dated December 15, 1927, GILBERT MILLER, CLIFFORD W. MICHEL and PAUL FELIX WARBURG, Surviving and Successor Trustees,

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1956

Jules S. Bache Trust for Hazel B. Beckman u/d dated June 1, 1921, Clifford W. Michel, C. Frank Reavis and William B. Franke, Surviving and Successor Trustees,

Jules S. Bache Trust for Kathryn B. Miller, u/d dated December 15, 1927, Gilbert Miller, Clifford W. Michel and Paul Felix Warburg, Surviving and Successor Trustees,

Petitioners,

—against—

Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in the above entitled cases on December 27, 1956, upon which rehearing was denied on January 17, 1957.

Citations to Opinions Below

The opinion of Judge Stephen E. Rice in The Tax Court of the United States is reported in 24 T. C. 960 (1956), a copy is printed in Appendix B hereto, page 19. The opinion of the Court of Appeals, printed in Appendix hereto, page 29, is unreported.

Jurisdiction

The Judgment of the Court of Appeals was entered on December 27, 1956. Rehearing was denied on January 17, 1957, Appendix B, page 33. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

The question involved is whether *inter vivos* trusts (Petitioners herein), created 23 and 17 years before the donor's death in 1944 can compute capital gains tax on sales of stock made by them in 1948, four years after donor's death, by including in the costs of such stock not only the donor's original cost, but also the compromise payments of donor's estate tax (based on 1944 values) assessed against them, paid by them to protect and preserve the trust estate, and properly charged by them to their capital accounts.

Statutes Involved

The statutes involved are: Section 113(a)(2),* Section 113(a)(5), Section 113(b)(1)(A), and Section 113(b)(2) of the Internal Revenue Code of 1939. Those sections, which deal with the cost or basis of property for income tax purposes provide as follows:

> SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.
>
> (a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that— • • •

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* All references to the statute are to sections of the Internal Revenue Code of 1939 unless otherwise indicated.

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, * * * for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years. * * *

(2) *Substituted basis.*—The term "substituted basis" as used in this subsection means a basis determined under any provision of subsection (a) of this section or under any corresponding provision of a prior income tax law, providing that the basis shall be determined—

(A) by reference to the basis in the hands of a transferor, donor, or grantor, or

(B) by reference to other property held at any time by the person for whom the basis is to be determined.

Whenever it appears that the basis of property in the hands of the taxpayer is a substituted basis, then the adjustments provided in paragraph (1) of this subsection shall be made after first making in respect of such substituted basis proper adjustments of a similar nature in respect of the period during which the property was held by the transferor, donor, or grantor, or during which the other property was held by the person for whom the basis is to be determined. A similar rule shall be applied in the case of a series of substituted bases.

• • • • •

Statement

This is a Federal income tax case. The findings of fact are contained in the opinion of the Tax Court promulgated on August 31, 1955. The Tax Court incorporated by reference stipulations of facts dated April 13, 1955 between Petitioners and Respondents. The stipulation of facts in the *Beckman* case is printed in Appendix A, *infra* pages 13, 18, the stipulation in the *Miller* case was substantially identical.

In 1921 and 1927, Jules S. Bache created two living trusts, the Petitioners in this proceeding (R. 7a, 13a). He died in 1944 (R. 7a, 13a). Both trusts were irrevocable trusts at the date of death of Jules S. Bache and no part of the income or corpus of either trust could revert to Jules S. Bache (R. 5a, 13a).

By letter dated April 6, 1948 the Federal estate tax authorities claimed that the trusts were subject to estate tax and were to be taxed at their 1944 values (R. 7a, 13a). This claim was made as part of a contention that substantially all of the transfers made by Jules S. Bache during his lifetime were includible in his estate (R. 7a, 13a) on the theory

that the transfers (including the *inter vivos* trusts here involved) should be treated as if they involved transfers of property at the decedent's death in 1944.

A claim was thus made against the Beckman Trust as transferee of approximately $1,900,000 (R. 7a, 13a) and against the Miller Trust as transferee in a like amount.

The claim for deficiency in Federal estate tax was protested and any deficiency was denied (R. 8a, 14a) on the grounds that the Beckman Trust was created more than 23 years and the Miller Trust more than 17 years prior to the death of Jules S. Bache and he had no interest in either trust at the date of his death.

Faced with the possible loss of more than two-thirds of their total assets (including possible claims for New York estate taxes) if the deficiency proposed should be sustained, it was deemed advisable by the trustees after considerable negotiation to settle the claim and clear the Petitioners' title to their respective assets (R. 8a, 13a). The claims as originally made were liens against Petitioners' assets.

The claims were finally compromised and a tax of approximately $985,000 was paid by the Petitioners in settlement of the aggregate tax claim of approximately $3,800,000 (R. 8a, 14a).

These payments, together with payments of New York estate tax resulting from the compromise of the Federal claim, were charged by each of the Petitioners to its capital account.

In 1948 the trustees of each of the trusts, in arms-length transactions, sold shares of stock (R. 9a, 15a). The amount of gain or income realized on such sales is in dispute. It depends upon the trustees' "cost" or "basis." The "cost" or "basis" of property received as a gift, for determining

gain on subsequent sale, is the donor's cost with adjustments for transactions occurring after the gift.

Petitioners contend that the amounts paid in settlement of the disputed estate taxes by them and properly charged to capital account, must be added to basis and taken into account in determining the amount of gain realized on sales of trust property thereafter made. Respondent denies this. This is the issue in the case.

The Government herein claims that despite the fact that the compromise payment was based on 1944 values, the cost or basis is restricted to the donor's cost (which is lower than the fair market values of the properties in 1921 and 1927). It refused any adjustment for the amounts paid based on the 1944 values despite the fact that such amounts were paid to preserve and protect the property and clear Petitioners' title to the gifts made 17 and 23 years before the death of the donor.

Deficiencies were asserted against Petitioners for 1948 income taxes based upon the disallowance of the adjustments to cost basis of the securities sold.

Petitions were filed with the Tax Court of the United States for a redetermination of the proposed deficiencies, and the proceedings were consolidated by that Court.

Judge Rice, who considered the case in the Tax Court, rejected the Petitioners' contention and held the present cases involving *inter vivos* transfers were subject to rules applicable to inherited property (*Beck* v. *Commissioner*, 15 T. C. 642, aff'd 194 F. 2d 537) and that therefore the adjustments were improper. He did not discuss the statute involved and held the instant case distinguishable from *Commissioner* v. *Moffett*, 191 F. 2d 149 (1951), a case in which the donee of property was permitted to increase

her cost basis for property under circumstances indistinguishable from the present case.

Petitioners appealed from the Tax Court decision pursuant to 28 U. S. C., Section 1254(1). The Court of Appeals for the Second Circuit, per curiam, affirmed on Judge Rice's opinion "relying" on the *Beck* case and "appropriately distinguishing the *Moffett* case."

Reasons for Granting the Writ

I. The present cases involve an important question arising under the Internal Revenue Code of 1939. Petitioners have been denied the right to increase their cost basis for securities sold despite a clear statutory provision authorizing them to do so. This Court has never ruled on the issue involved here. The decisions by lower Courts on the question are confusing. Indeed, as we shall see, the decisions by the Court of Appeals for the Second Circuit are in conflict.

The income tax statute here involved is Section 113(b)(1)(A) of the Internal Revenue Code of 1939. That section provides that "Proper adjustment * * * shall in all cases be made—for expenditures, * * * properly chargeable to capital account," other than "for taxes * * * for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years; * * *." The estate taxes in the present case have never been deducted.

The statutory authority is clear. Petitioners' basis should be increased "for expenditures, * * * properly chargeable to capital account." The expenses here incurred were charged to the capital account. That they were "properly" so charged appears from the legislative history.

> "These taxes [estate, inheritance, legacy, succession, and gift taxes] constitute * * * charges imposed upon the transfer of capital." H. Rept. 704, 73rd Cong., 2d Sess., p. 22; also reported in 1939-1 (Part 2) C. B. 570.

The Courts below denied the adjustments in the instant cases, involving *inter vivos* gifts, by applying rules applicable to inherited property. The applicable statutory provisions apply different rules to *inter vivos* gifts and inherited property. The adjustments sought herein are permitted in the case of *inter vivos* gifts, and denied as to inherited property.

The difference in treatment of property subjected to an estate tax for which date of death values prevail (inherited property) and property subjected to estate taxes for which date of death value does not prevail (*inter vivos* gifts), is established by Section 113 of the Internal Revenue Co[illegible] of 1939.

Section 113(a) sets forth the general rule that the basis of property is the cost of such property with enumerated exceptions. Section 113(b) provides for adjustments to the basis determined under Section 113(a).

Among the enumerated exceptions to cost are property received as an *inter vivos* gift and property transmitted at death.

In the case of property received by *inter vivos* gift, Section 113(a)(2) provides that the basis of the property in the hands of the donee shall be the same as the basis of the property in the donor's hands.

In the case of property transmitted at death, Section 113(a)(5) provides that the basis shall be the fair market value of the property at the time of such acquisition, i.e. the date of death.

Section 113(b)(1) provides, as shown above, additions to basis for capital charges.

Section 113(b)(2) provides that in the case of *inter vivos* gifts adjustments shall be made for all capital charges incurred with respect to the property beginning with the date of original acquisition by the donor. *Per contra* with respect to property transmitted at death, adjustments are permitted only for capital charges incurred after the date of death.

In the case of property transmitted at death the provisions of Section 113(b)(1) are applicable only after the property is acquired. An adjustment for estate taxes paid on account of the inclusion of the property in the decedent's estate, whether or not the estate taxes are paid directly by the estate or by the legatee receiving the property, is not permitted under Section 113(b)(1). The adjustment for estate taxes has automatically been made since the owner of the property is permitted under Section 113(a)(5) to use the date of death value at which the property was taxed for estate tax purposes. This is the *Beck* case, erroneously relied on by the Courts below.

II. The decision of the Court of Appeals in the instant cases is in conflict with its prior decision in *Commissioner* v. *Moffett*, 191 F. 2d 149 (1951). The question in the instant cases and the *Moffett* case was identical. Both involved the addition to cost basis of compromise payments for estate taxes asserted against property which was received as an *inter vivos* gift. The addition was permitted in the *Moffett* case but denied in the instant cases. There is no logical distinction between the cases and the conflicting results reached should be resolved by this Court.

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180 (1939);
Maggio v. *Zeitz*, 333 U. S. 56 (1948).

In the *Moffett* case taxpayer was the surviving annuitant of a joint and survivor annuity policy which had originally been purchased by her deceased husband at a total cost of $730,000. No asset was included in the husband's estate for Federal estate tax purposes with respect to the annuity contracts. Upon audit of the estate tax return a deficiency of approximately $319,000 was asserted based upon including the fair market value of the contracts in the taxable estate. Claim was made against the taxpayer as transferee for payment of the deficiency. After negotiation for settlement of the matter, and in the exercise of prudent judgment for the purpose of preserving and protecting her rights to the annuity, taxpayer paid $78,000 in settlement of the claim and discharged the annuity from the lien for estate taxes.

One of the issues before the Courts was whether such payment should be treated as an addition to basis under Section 113(b)(1)(A)—the issue in the present cases.

The Courts held that the payment was a proper addition to basis under Section 113(b)(1)(A). As succinctly stated by the Tax Court in 1951:

> "The United States Court of Appeals for the Second Circuit, in its decision on appeal by both parties in the *Moffett* case, held as we [the Tax Court] did on this point, namely, that *the amount of estate tax paid was a part of the cost* of annuities, * * *." *Estate of Hetty B. Levy*, 17 T. C. 728, 732 (1951). (Italics supplied.)

In the instant cases the Court of Appeals affirmed the Tax Court and approved its reliance on *Marion A. Burt Beck*, 15 T. C. 642, aff'd 194 F. 2d 537.

In the *Beck* case, the taxpayer was one of the legatees under the Will of Wellington R. Burt who died on March 2,

1919. As a result of an agreement settling a will contest, taxpayer received a 1/6th interest in (a) iron ore lands having a fair market value at the date of death of $5,479,576.43 and (b) $720,000.00 cash. As a condition of receiving her legacy, taxpayer was required to agree to pay her aliquot share of $1,356,400.00, the amount of Federal and State estate and inheritance taxes. The amount of tax was paid by taxpayer who borrowed her share of tax from trustees under her father's will and agreed to repay such loan out of her royalties from the inherited property.

In the tax year in question, the taxpayer sought to deduct from the royalty income the repayment of the loan made to finance the estate taxes. This deduction was claimed as an "exhaustion allowance" *in addition* to the regular depletion allowance based upon the fair market value of the inherited property at the date of death upon which estate tax had been paid.

The Courts correctly denied the claimed deduction.

In the *Beck* case, the taxpayer's basis for the inherited property already included the amount of estate taxes paid. Her basis was the fair market value of the property despite the fact that her inheritance was the difference between the fair market value of the property and the estate taxes paid.

To have permitted the deduction claimed by the taxpayer in the *Beck* case, would have resulted in a duplication of tax benefits by reason of the estate tax payment—once for the inclusion of the estate taxes in the fair market value of the inherited property, and a second time for the deduction urged by the taxpayer.

The *Moffett* case was correctly decided since it involved *inter vivos* property and the adjustments to cost basis are permitted under Section 113(a)(2). The *Beck* case was

correctly decided since it involved inherited property and the adjustments to cost basis are not permitted under Section 113(b)(2). The instant cases were incorrectly decided since they involve *inter vivos* property and the adjustments are permitted under Section 113(b)(2). Moreover, the decision is in conflict with the *Moffett* case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. Stipulation of facts in *Beckman* case is as follows (R. 5a-10a):

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Docket No. 49908

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that the following facts shall be taken to be true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The Jules S. Bache trust for Hazel B. Beckman under deed of trust dated June 1, 1921, Clifford W. Michel, C. Frank Reavis and William B. Franke, surviving and successor trustees, with its principal office c/o Clifford W. Michel, 42 Wall Street, New York 5, N. Y., is the tax-

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payer in this proceeding, and is hereinafter referred to as "Petitioner."

2. The duly appointed and presently qualified and acting surviving and successor trustees of the petitioner are Clifford W. Michel, C. Frank Reavis and William B. Franke. Petitioner is an *inter vivos* trust created under the laws of the State of New York on June 1, 1921 by Jules S. Bache for the benefit of his daughter Hazel B. Beckman.

3. Petitioner, at the date of death of Jules S. Bache, was an irrevocable trust, and no part of the income or corpus could revert to said Jules S. Bache.

4. The present proceeding involves a deficiency in Federal income tax of Petitioner for the calendar year 1948.

Appendix A

5. Petitioner reports its income on the basis of a calendar year and timely filed its tax return for the taxable period here involved with the Collector of Internal Revenue, Second District, New York.

6. The tax shown on the return filed by Petitioner was $52,135.06, all of which was timely paid.

7. By letter dated June 1, 1953, the Commissioner determined a deficiency in Petitioner's 1948 income tax liability of $35,055.43, which determination is the basis of this proceeding.

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8. Petitioner denies that any part of said deficiency is due.

9. Said deficiency arose from a determination by the Commissioner that the correct income tax cost basis of 3,937 shares of stock of Wenonah Development Company sold by Petitioner in 1948 was $293,415.49 or $74.527683 per share, the basis in the hands of the Grantor as adjusted for items other than those herein involved.

10. Petitioner contends that the correct income tax cost basis of the 3,937 shares of stock of Wenonah Development Company sold by Petitioner in 1948 is $433,637.22 or $110.1440742 per share.

11. At the beginning of the year in question, the sole asset of Petitioner was 18,028 shares of stock of Wenonah Development Company, consisting of 3,894 shares of Class A stock of Wenonah Development Company and 14,134 shares of Class B stock of Wenonah Development Company.

Appendix A

12. Wenonah Development Company is a personal holding company whose assets consist largely of the securities or other corporations. At the beginning of the tax year in question, there were issued and outstanding a total of 68,510 shares of Class A and Class B stocks of Wenonah Development Company.

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13. Jules S. Bache died a citizen of the United States and a resident of New York on March 28, 1944.

14. The executors of the Estate of Jules S. Bache in reporting his taxable estate for Federal estate tax purposes did not include any of the shares of stock of Wenonah Development Company held by Petitioner.

15. By a deficiency letter dated April 6, 1948, the Commissioner of Internal Revenue proposed to include in the taxable estate of Jules S. Bache for Federal estate tax purposes substantially all of the transfers made by him during his lifetime, including the assets owned by Petitioner.

16. The assets held by Petitioner valued at $2,854,192.96 were included by Respondent in the taxable estate of Jules S. Bache for Federal estate tax purposes under Section 811(c) of the Internal Revenue Code of 1939 on the grounds that the transfers were essentially testamentary in character.

17. On the basis of Respondent's including the assets owned by Petitioner in the taxable estate of Jules S. Bache for Federal estate tax purposes, Petitioner would become liable for taxes of approximately $1,900,000.

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18. Since it was not otherwise directed by the Will of Jules S. Bache, Petitioner was liable for this deficiency under Section 124 of the New York Decedent Estate Law if it were ultimately determined that Petitioner's assets were includible in the taxable estate of Jules S. Bache for Federal estate tax purposes.

19. After consultation between executors of the Estate and Petitioner, a protest was filed opposing the above claim and denying such deficiency.

20. In June, 1948, by reason of the settlement of the claim for estate taxes on the Estate of Jules S. Bache made with the approval of Petitioner, and the inclusion in the gross estate of the value of the remainder of Petitioner, Petitioner became liable for the payment of $509,428.41.

21. As the result of the settlement of the claim for Federal estate tax asserted against the Estate of Jules S. Bache, Petitioner became liable for New York estate tax of $132,663.89.

22. The Federal estate tax of $509,428.41 was paid on or about July 23, 1948.

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23. The New York estate tax of $132,663.89 was paid on or about September 23, 1948.

24. The payments of $509,428.41 and $132,663.89 were charged on the books of Petitioner to Petitioner's capital account.

Appendix A

25. On or about July 29, 1948 but as of July 24, 1948, Petitioner, after extensive negotiation, and in an arms-length transaction, sold to the Estate of Jules S. Bache 3,085 shares of stock of Wenonah Development Company (consisting of 666 shares of Class A stock and 2,419 shares of Class B stock) at a total sales price of $509,423.95.

26. On or about October 6, 1948 but as of September 30, 1948, Petitioner, after extensive negotiation, and in an arms-length transaction, sold to the Estate of Jules S. Bache 852 shares of Wenonah Development Company stock (consisting of 184 shares of Class A stock and 668 shares of Class B stock) at a total sales price of $132,753.49.

27. In computing Taxpayer's cost for the 3,937 shares of Wenonah Development Company stock sold in 1948, Petitioner treated as part of the adjusted cost basis of

said stock $140,221.73 by reason of the payments charged by it to capital account of $509,428.41 and $132,663.89.

28. Said sum of $140,221.73 was determined by dividing the total of $509,428.41 and $132,663.89 and 18,028, the number of shares of Wenonah Development Company stock owned by Petitioner, and multiplying the resultant quotient by 3,937, the number of shares of Wenonah Development Company stock sold by Petitioner in 1948.

29. Petitioner's per share cost of Wenonah Development Company stock as a result of the adjustments to basis claimed by Petitioner, resulting from the payments of $509,428.41 and $132,663.89, is $110.1440742.

Appendix A

30. If the Court determines that the correct adjusted cost basis of the 3,937 shares of Wenonah Development Company stock sold by Petitioner in 1948 is $110.1440742 per share, then there is no deficiency in Taxpayer's 1948 Federal income tax.

31. If the Court determines that the correct adjusted cost basis of the 3,937 shares of Wenonah Development Company stock sold by Petitioner in 1948 is $74.527683

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per share, then there is a deficiency in Petitioner's 1948 Federal income tax of $35,055.43.

Dated: April 13, 1955

/s/ MARTIN D. JACOBS

/s/ ALLAN F. AYERS, JR.

/s/ PETER J. REPETTI
Attorneys for Petitioner

(Sgd) R. P. HERTZOG
Attorney for Respondent.

APPENDIX B

1. Opinion of Tax Court Judge Stephen E. Rice.

The opinion of the Tax Court in both cases which was filed on August 31, 1955 and is reported in 24 T. C. 960 is as follows:

Docket Nos. 49908, 50063.—Filed August 31, 1955.

In 1948, the petitioner trusts paid additional estate taxes on the estate of decedent Jules S. Bache pursuant to the respondent's determination that their corpora were gifts in contemplation of death. Their assets consisted of certain shares of stock. After payment of the additional estate taxes, they sold a part of such shares and in computing the gain thereon added to their bases the proportionate amount of additional estate taxes which they had paid. *Held,* the estate taxes paid by petitioner trusts were not payments to protect and preserve their assets within the meaning of section 113(b)(1)(A) of the 1939 Code and, hence, were not proper additions to the bases of such assets.

PETER J. REPETTI, Esq., and
GERALD SILBERT, Esq.,
for the petitioners.

CLAY C. HOLMES, Esq.,
for the respondent.

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OPINION

RICE, *Judge*:

These consolidated proceedings involve deficiencies in income tax for 1948 determined by the respondent against the Jules S. Bache Trust for Hazel B. Beckman and the

Jules S. Bache Trust for Kathryn B. Miller, in the respective amounts of $35,055.43 and $30,510.13.

The sole issue is whether estate taxes paid by the petitioner trusts on the estate of Jules S. Bache, in compromise of the respondent's determination that the corpora of such trusts were gifts in contemplation of death, were properly chargeable to their capital accounts and, hence, proper additions to the bases of assets held by them, within the meaning of section 113(b)(1)(A) of the 1939 Code.[1]

All of the facts were stipulated, are so found, and are incorporated herein by this reference.

Jules S. Bache established a trust for his daughter Hazel B. Beckman (hereinafter referred to as the Beckman trust) on June 1, 1921. Clifford W. Michel, C. Frank Reavis, and William B. Franke are the surviving and successor trus-

tees. On December 15, 1927, Bache established a trust for his daughter Kathryn B. Miller (hereinafter referred to as the Miller trust). Gilbert Miller, Clifford W. Michel, and Paul Felix Warburg are the surviving and successor trus-

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1 SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) General rule.—Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, or for expenditures described in section 23(bb), for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * *

tees. At the time of Bache's death on March 28, 1944, both trusts were irrevocable. The trusts reported their income on the calendar year basis and filed returns for the year in issue with the collector of internal revenue for the second district of New York.

At the beginning of the year in issue, the sole assets of the Beckman trust consisted of 18,028 shares of stock of the Wenonah Development Company, of which 3,894 shares were Class A stock and 14,134 shares were Class B stock. At the beginning of the year in issue, the sole assets of the Miller trust were a like number of shares which were similarly divided between Class A and Class B stock. Wenonah Development Company is a personal holding company whose assets consist largely of securities of other corporations.

The executors of Bache's estate in reporting the value of such estate for tax purposes did not include the shares of stock held by the two trusts. By a deficiency letter dated April 6, 1948, the respondent included in Bache's taxable estate substantially all transfers made by him during his lifetime, including the assets of the two trusts. He thus included in Bache's estate the assets held by Beckman trust at a value of $2,854,192.96, on the grounds that the transfer of such assets by Bache to the trust were essentially testamentary in character and, hence, includible in the valuation

of his estate under section 811(c) of the 1939 Code. He also included in Bache's estate assets of the Miller trust having the same value as those of the Beckman trust. By virtue of the respondent's inclusion of the assets of the two trusts in Bache's estate and because his Will did not otherwise provide, they each became contingently liable for estate taxes in the approximate amount of $1,900,000,

under section 124 of the New York Decedent Estate Law and section 827(b) of the 1939 Code if the respondent's determinations were ultimately upheld.

In June 1948, the two trusts and the executors of Bache's estate agreed with the respondent on a compromise of the additional estate taxes determined by him. On July 23, 1948, the Beckman trust paid Federal estate taxes on Bache's estate in the amount of $509,428.41; and on that date, the Miller trust paid Federal estate taxes of $475,243.71. The two trusts, by virtue of the compromise with respondent, became liable for additional New York estate taxes on Bache's estate. On September 23, the Beckman trust paid such additional taxes in the amount of $132,663.89; and, on the same day, the Miller trust paid such additional taxes in the amount of $123,761.55.

On or about July 29, 1948, but as of July 24, 1948, the Beckman trust sold 3,085 shares of Wenonah Development Company stock for $509,423.95. On or about October 6, 1948, but as of September 30, 1948, it sold an additional 852 shares of such stock for $132,753.49.

On or about August 9, 1948, but as of July 24, 1948, the Miller trust sold 2,878 shares of Wenonah Development Company stock for $475,242.18. On or about October 6,

1948, but as of September 30, 1948, it sold an additional 795 shares of such stock for $123,872.10.

In determining the gain realized on the sales of stock, the trusts added to their bases that part of the Federal and New York estate taxes paid by them on the Bache estate which was allocable to the number of shares sold. The respondent determined that the estate taxes paid by the trusts were not proper additions to the bases of the stock sold by

them under the provisions of sections 23(c)(1)(D)[2] and 113(b)(1)(A) of the 1939 Code and determined the deficiencies here in issue.

The petitioner trusts brought these proceedings on the grounds that the estate taxes paid by them were expenditures to protect and preserve their property and, hence, were proper charges to their capital accounts within the meaning of section 113(b)(1)(A). In support of their argument, the petitioners cite *Irene C. Moffett*, 14 T. C. 445 (1950), revd. in part 191 F. 2d 149 (C. A. 2, 1951), and *Estate of Hetty B. Levy*, 17 T. C. 728 (1951).

In the *Moffett* case the taxpayer's husband had purchased joint and survivorship annuities at a cost of $730,000. The

taxpayer's husband thereafter died and the respondent determined the value of such annuities was includible in his gross estate. The taxpayer compromised the asserted liability against her by payment of $78,004 of additional estate taxes on her husband's estate. She also paid additional State inheritance taxes. We held that the payment which the taxpayer made was "for the protection and preservation of her rights as annuitant, and constitutes a capital expenditure." We held further that such capital cost could be amortized over her remaining life expectancy.

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2 SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) Taxes Generally.—

(1) Allowance in general.—Taxes paid or accrued within the taxable year, except—

* * * * *

(D) estate, inheritance, legacy, succession, and gift taxes;

* * * * *

Appendix B

The Court of Appeals for the Second Circuit held that the tax payment which the taxpayer made was, in effect, a purchase of annuity contracts to the extent of the payment and that the amounts received by her under the annuity contracts were not tax-free returns of capital except as provided in section 22(b)(2)(A) of the 1939 Code.

In the *Levy* case, the taxpayer received stock from her husband as a gift. He later died. She sold the stock and realized a gain. The following year the respondent determined that the stock was a gift by taxpayer's husband in contemplation of death, and that its value was includible in his gross estate. The taxpayer compromised an additional deficiency determined against the estate by payment of $53,978.83 of additional estate taxes. She then sought to adding to such bas.s the amount of additional estate taxes paid by her. We held that the addition of such tax payments was improper because the transactions occurred in two different taxable years. In the course of our opinion, we stated at page 730:

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> While taxes of a donor or transferor of property which the recipient is required to pay in order to retain the property may be capital expenditures under some circumstances, we conclude that under the facts in this case the estate tax paid in 1946 by the decedent cannot be classified as being an expenditure of that nature. * * *

On the basis of our holding in the *Moffett* case and our above-mentioned statement in the *Levy* case, the petitioner trusts argue here that had the respondent been successful in sustaining his determination that their entire corpora were includible in Bache's estate as gifts made in contemplation of death, they would have lost more than two-thirds of

their assets because of their liability to pay approximately $1,900,000 each in satisfaction of additional estate taxes. They argue, further, that the compromise payments which they made were to preserve and to protect their property, that they are inter vivos trusts established 23 and 17 years, respectively, prior to the decedent's death, and, finally, that such payments were therefore properly chargeable to their capital accounts.

The respondent, on the other hand, cites our holding in *Marion A. Burt Beck*, 15 T. C. 642 (1950), affd. 194 F. 2d 537 (C. A. 2, 1952), certiorari denied 344 U. S. 821 (1952), in support of his determination that the taxes paid by the trusts were not proper additions to the bases of the stock sold by them in 1948. In the *Beck* case, the taxpayer in compromise of a dispute with her father's estate acquired certain iron ore lands. She agreed to pay the proportionate share of the Federal and State inheritance taxes on the assets transferred to her. She claimed that the taxes so paid were proper additions to the basis of the iron ore land in computing the depletion allowance thereon. We re-

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jected her argument and held that the basis for depletion was the same as that for determining gain upon the sale of property. We said that the basis for determining gain on the sale of inherited property was the fair market value when it was acquired and not the petitioner's out-of-pocket costs added to such market value. We agree with the respondent that our holding in the *Beck* case is controlling here, and that the *Moffett* and *Levy* cases are inapplicable.

Stripped of immaterial factual dissimilarities with the *Beck* case, and irrelevant arguments to the effect that the trusts here were inter vivos transfers of property, the essential question is this: Can the transferee of a decedent's

property pay his transferee share of a compromised estate tax deficiency, for which share he is admittedly liable under State and Federal law, and recoup a part of such tax by adding the amount thereof to the basis of the property transferred to him; subsequently sell the property; and compute the gain thereon by using the increased basis. As we pointed out in *Marion A. Burt Beck, supra,* page 664:

> • • • If estate taxes, paid proportionately by agreement between the recipients of legacies, were considered to be subject to "exhaustion allowances" then as to every such case the estate tax provisions of the law would come to naught for the original payments of those taxes would be recovered by the taxpayer by deductions over the years and the net gain in revenue to the government from the estate tax would be nil.

We note that in the *Beck* case the amount of estate taxes paid could have been recouped in full if the taxpayer had prevailed there. Here, on the other hand, only a part of the estate taxes could be recouped by the trusts by way of adding such taxes to the bases of their assets which they

subsequently sold at a gain. However, we do not regard the fact that the amount of the taxes in the *Beck* case could have been recouped in full, while here only in part, to be a distinction of any importance because the basic theory in both cases is the same.

The petitioner trusts admit their liability for the amount of estate taxes paid under the compromise agreement with the respondent. Hence, their payment of such taxes was no different than the payment of such taxes by any legatee of the estate. Thus, the fact that the trusts were established many years prior to Bache's death is immaterial to the question before us.

Appendix B

Pursued to its logical conclusion the petitioners' argument would mean that the administrator or executor of an estate could distribute the decedent's property to the legatees or beneficiaries, who, in turn, might compromise or even pay in full the estate tax liability determined by the Commissioner. The legatees would then add the amount of the tax paid by them to the bases of the assets received from the estate and would determine gain upon the subsequent sale of such assets on the increased basis; thus, recouping a large part of the estate taxes paid if the assets were sold at a price equal to or above the increased basis. Hence, a holding in the petitioners' behalf here would, in effect, eliminate a large part of the estate tax as an effective revenue raising measure. We think that decision is for Congress, not for us, to make.

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We do not regard our statement in *Estate of Hetty B. Levy, supra,* quoted above, applicable to the facts of this case; and we consider our holding in *Irene C. Moffett, supra,* as confined to the specific facts on which it was reached.

Decisions will be entered for the respondent.

2. The decision of the Tax Court entered September 14, 1955 in the *Beckman* case (R. 27a), is as follows:

THE TAX COURT
OF THE UNITED STATES
WASHINGTON

Docket No. 50063

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed August 31, 1955, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of $30,510.13 for the year 1948.

ENTER:

ENTERED: September 14, 1955

(Signed) STEPHEN E. RICE
Judge.

3. The decision of the Tax Court entered September 14, 1955 in the *Miller* case (R. 28a), is as follows:

Pursuant to the determination of the Court, as set forth in its Opinion, filed August 31, 1955, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of $30,510.13 for the year 1948.

ENTER:

ENTERED: September 14, 1955

(Signed) STEPHEN E. RICE
Judge.

Appendix B

4. Opinion of the Court of Appeals for the Second Circuit.

The opinion of the Court of Appeals for the Second Circuit, which was filed on December 27, 1956, in both cases, and is unreported is as follows:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 84, 85—October Term, 1956.

(Argued December 7, 1956 Decided December 27, 1956.)

Docket Nos. 23958, 23959

CLIFFORD W. MICHEL *et al.*, Trustees u/d of JULES S. BACHE for HAZEL B. BECKMAN, and

GILBERT MILLER *et al.*, Trustees u/d of JULES S. BACHE for KATHRYN B. MILLER,

Petitioners-Appellants,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

CLARK, *Chief Judge,* and
FRANK and LUMBARD, *Circuit Judges.*

On petition to review a decision of the Tax Court of the United States, Stephen E. Rice, *Judge.*

The trustees under deeds of trust created by Jules S. Bache for the benefit of Hazel B. Beckman and Kathryn

B. Miller respectively petition for review of a decision, 24 T. C. 960, finding deficiencies in their 1948 income taxes, based on increases assessed in the amounts of capital gains received on shares of trust stock sold, upon rejection of their contentions that the cost bases of such shares must be increased by a proportionate part of the amounts paid in compromise of the Commissioner's claims for estate taxes on the trust corpora as gifts made in contemplation of death by the donor. Affirmed.

WILBUR H. FRIEDMAN, of Proskauer, Rose, Goetz & Mendelsohn, New York City (Martin D. Jacobs, Allan F. Ayers, Jr., and Peter J. Repetti, of Hodges, Reavis, McGrath, Pantaleoni & Downey, New York City, on the brief for Hazel B. Beckman Trust; Charles Looker and Gerald Silbert, of Proskauer, Rose, Goetz & Mendelsohn, New York City, on the brief for Kathryn B. Miller Trust), *for petitioners-appellants.*

MELVA M. GRANEY, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., and Lee A. Jackson and Hilbert P. Zarky, Attys., Dept. of Justice, Washington, D. C., on the brief), *for respondent.*

PER CURIAM:

Affirmed on the decision of Judge Rice, 24 T. C. 960, relying on *Beck* v. *C. I. R.*, 15 T. C. 642, affirmed 2 Cir., 194 F. 2d 537, certiorari denied 344 U. S. 821, and appropriately distinguishing *Moffett* v. *C. I. R.*, 2 Cir., 191 F. 2d 149.

Appendix B

5. The judgment of the Court of Appeals for the Second Circuit in the *Beckman* case is as follows:

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

JULES S. BACHE TRUST for HAZEL B. BECKMAN u/d dated 6/21/21, CLIFFORD W. MICHEL, C. FRANK REAVIS and W. B. FRANKE, Surviving and Successor Trustees,
Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Appendix B

6. The judgment of the Court of Appeals for the Second Circuit in the *Miller* case is as follows:

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

JULES S. BACHE TRUST for KATHRYN B. MILLER, u/d dated 12/15/27, GILBERT MILLER, CLIFFORD W. MICHEL and PAUL FELIX WARBURG, Surviving and Successor Trustees,
Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Appendix B

7. The opinion and judgment of the Court of Appeals for the Second Circuit entered on Jan. 17, 1957, in both cases denying the petition for rehearing, are as follows:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLIFFORD W. MICHEL *et al.*, Trustees u/d of JULES S. BACHE for HAZEL B. BECKMAN, and GILBERT MILLER *et al.*, Trustees u/d of JULES S. BACHE for KATHRYN B. MILLER,

Petitioners-Appellants,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before:

CLARK, *Chief Judge,* and
FRANK and LUMBARD, *Circuit Judges.*

On Petition for Rehearing.

MARTIN D. JACOBS, ALLAN F. AYERS, JR., and PETER J. REPETTI, of Hodges, Reavis, McGrath, Pantaleoni & Downey, New York City, and WILBUR H. FRIEDMAN, CHARLES LOOKER, and GERALD SILBERT, of Proskauer, Rose, Goetz & Mendelsohn, New York City, *for petitioners.*

PER CURIAM:

Petition for rehearing denied.

C. E. C.
J. E. L.
U.S.C.JJ.

Dated: January 17, 1957.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of January, one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD,
Circuit Judges.

JULES S. BACHE TRUST for HAZEL B. BECKMAN, etc.,
Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JULES S. BACHE TRUST for KATHRYN B. MILLER, etc.,
Petitioners,

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioners,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 869

JULES S. BACHE TRUST FOR HAZEL B. BECKMAN U/D DATED JUNE 1, 1921, CLIFFORD W. MICHEL, C. FRANK REAVIS AND WILLIAM B. FRANKE, SURVIVING AND SUCCESSOR TRUSTEES, PETITIONERS

JULES S. BACHE TRUST FOR KATHRYN B. MILLER, U/D DATED DECEMBER 15, 1927, GILBERT MILLER, CLIFFORD W. MICHEL AND PAUL FELIX WARBURG, SURVIVING AND SUCCESSOR TRUSTEES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. 19–27) is reported at 24 T. C. 960. The *per curiam* opinion of the Court of Appeals (Pet. 29–30) is reported at 239 F. 2d 385.

JURISDICTION

The judgments of the Court of Appeals were entered on December 27, 1956 (Pet. 31–32), and re-

hearing was denied January 17, 1957 (Pet. 33-34). The petition for a writ of certiorari was filed March 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the court below erred in affirming the Tax Court's holding that the estate taxes paid by the taxpayer-trusts in compromise of additional estate tax liability on the estate of Jules S. Bache are not items "properly chargeable to capital account" within the meaning of 1939 Code Section 113 (b) (1) (A), and, therefore, in computing the trusts' capital gains from sales of portions of their sole asset consisting of stock, cannot be added to the trusts' bases for such stock.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except * * *.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or

other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) [as amended by Sec. 130 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * *

(26 U. S. C. 1952 ed., Sec. 113.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.113 (a) (2)–1. *Property Transmitted by Gift After December 31, 1920.*—(a) *Property included.*—

* * * * *

Section 113 (a) (2) applies to all gifts of whatever description, whenever and however made, perfected, or taking effect; whether in contemplation of or intended to take effect in possession or enjoyment at or after the donor's death; * * *. Section 113 (a) (2) applies whether the gift was made by a transfer in trust or otherwise.

* * * * *

STATEMENT

The facts, which were all stipulated (Pet. 20), may be summarized as follows:[1]

The taxpayers, reporting their income on the calendar year basis, are trusts which were established by Jules S. Bache, one on June 1, 1921, for his daughter Hazel B. Beckman (hereinafter called the Beckman trust) and the other on December 15, 1927, for his daughter Kathryn B. Miller (hereinafter called the Miller trust). The assets of each trust consisted of shares of stock of the Wenonah Development Company, a personal holding company whose assets consisted largely of securities of other corporations. (Pet. 13–15, 20–21.)

After Jules S. Bache died in 1944, the executors of his estate did not include the corpora of the trusts in his gross estate for federal estate tax purposes. The Commissioner determined deficiencies in estate tax on the basis of his determinations that transfers made by the decedent during his lifetime, including the creation of the two taxpayer-trusts, were essentially testamentary in character. Under New York law each trust thereupon became contingently liable for $1,900,000 of the federal estate tax deficiency. In 1948, the Beckman trust compromised its federal estate tax liability by agreeing to pay and paying $509,428.41, as a result of which it became liable for New York estate tax in the amount of $132,663.89,

[1] Appendix A to the petition (pp. 13–18) contains the stipulation of facts as related to the trust for Hazel B. Beckman. The facts with respect to the trust for Kathryn B. Miller are substantially the same except for dates and other figures.

which it also paid in 1948. The Miller trust compromised its federal estate tax liability by agreeing to pay and paying $475,243.71, as a result of which it became liable for New York estate tax in the amount of $123,761.55, which it also paid in 1948. (Pet. 15–17, 21–22.)

The payments of estate taxes by both trusts were made with funds obtained from arms length sales in 1948, to the Jules S. Bache estate, of shares of Wenonah Development stock held by the trusts. In reporting their gain from those sales on their 1948 income tax returns, the trusts each allocated and added proportionate parts of their estate tax payments to the basis of the stock they sold. The deficiencies here in issue resulted from the Commissioner's determinations that the estate tax payments were not proper additions to the bases of the stock. (Pet. 17–18, 22–23.)

The Tax Court and Court of Appeals both upheld the Commissioner's deficiency determinations. (Pet. 23–27, 29–30.)

ARGUMENT

As grounds for granting the writ, taxpayers assert that the question presented is an important one (Pet. 7) and that the decision below is in conflict with the same court's prior decision in *Moffett* v. *Commissioner*, 191 F. 2d 149 (Pet. 9). Both assertions are incorrect.

1. The importance of the question is alleged merely on the basis of taxpayers' conception of the merits of the case. (Pet. 7–9.) But the decision below is

clearly correct. Taxpayers' statement that "different rules" apply to *inter vivos* gifts and inherited property (Pet. 8) is without warrant. The unadjusted bases of the two are different (cf. subsection (a) (2), *supra*, p. 2, with subsection (a) (5) of Section 113), but we are here concerned only with the adjustment to basis provided in subsection (b) (1) (A), *supra*, pp. 2–3, for items "properly chargeable to capital account". That adjustment is stated to be applicable to the "basis determined under subsection (a)" and is therefore equally applicable to the bases for inherited property and *inter vivos* gifts. Thus, the estate taxes paid by the taxpayer-trusts were no more "properly chargeable to capital account" than were the estate taxes paid by the taxpayer in *Beck* v. *Commissioner*, 15 T. C. 642, affirmed on other issues, 194 F. 2d 537 (C. A. 2d), certiorari denied, 344 U. S. 821, on which the court below relied. They were not taxes constituting carrying charges on property nor taxes of any other type intended by Congress to constitute proper charges to capital account.[2] See *Megibow* v. *Commissioner*, 218 F. 2d 687 (C. A. 3d). Nor did they constitute proper capital charges as representing or having the effect of something other than payments of taxes.

2. Taxpayers' assertion of conflict with the same court's prior decision in *Moffett* v. *Commissioner*, 191 F. 2d 149, is refuted by the action of the court below in affirming on the basis of the Tax Court's

[2] Taxpayers are of course in error in assuming (Pet. 7–8) that a contrary conclusion is reflected by a Congressional statement as to the nature of estate taxes as charges upon the transfer of capital.

decision as, among other things, "appropriately distinguishing" *Moffett*. (Pet. 30.) As the Tax Court stated (Pet. 24), in the *Moffett* case the court below held that the estate tax payment by the taxpayer was in effect a purchase of annuity contracts and that the amounts received by her under the annuity contracts were not tax-free returns of capital except as provided in Section 22 (b) (2) (A) of the 1939 Code. In the present case no purchase of property, in effect or otherwise, is involved. Unlike the situation in *Moffett*, the estate tax payments by the taxpayer-trusts did not result in the receipt of a larger property right than they would otherwise have had. Of course, even if the decisions of the Second Circuit were not in harmony with each other, this would not be a sufficient basis for review by this Court. Cf. *Wisniewski* v. *United States*, No. 762, this Term, decided March 25, 1957.

CONCLUSION

The decision below is correct and involves no important question or conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HILBERT P. ZARKY,
MELVA M. GRANEY,
Attorneys.

APRIL 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957